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In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH and HUMAN SERVICES, ET AL., PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, CROSS-PETITIONER

v.

OTIS R. BOWEN, SECRETARY OF HEALTH and HUMAN SERVICES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONERS/ CROSS-RESPONDENTS

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1. Respondent brought this action in the district court in an effort to establish its right to $11.3 million in additional Medicaid reimbursement for the years 1978-1982.[1] The first

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[1] In this reply brief, we use "respondent" to refer to respondent/cross-petitioner the Commonwealth of Massachusetts; "Resp. Br." to refer to respondent's brief; "petitioners" or "the Secretary" to refer to petitioners/cross-respondents the Secretary of Health and Human Services, et al.; "Pet. Br." to refer to our opening brief; "Ala. Br." to refer to the brief for the States of Alabama, et al., as amici curiae; "Calif. Br." to refer to the brief for the State of California as amicus curiae; "CSG Br." to refer to the brief for the Council of State Governments, et al., as amici curiae; "Grimesy Br." to refer to the brief for Victoria Grimesy, et al., as amici curiae; and "N.Y. Br." to refer to the brief for the State of New York as amicus curiae.

question presented is whether, in so doing, respondent sought a money judgment that the district court was not empowered to render. We showed in our opening brief (Pet. Br. 13-34) that the district court cannot enter a judgment requiring the federal government to pay money in the absence of a waiver of sovereign immunity, and that the only waiver that might apply to this case in the district court is Section 10(a) of the Administrative Procedure Act (APA), 5 U.S.C. (Supp. IV) 702, which permits only "[a]n action * * * seeking relief other than money damages." [2] We also showed (Pet. Br. 34-35) that Section 10(c) of the APA, 5 U.S.C. 704, would preclude this action even if the "money damages" exclusion in Section 702 did not apply, because respondent has a Tucker Act (28 U.S.C. 1491) remedy that is, in the words of Section 704, an "other adequate remedy in a court."

[2] Some amici dispute even the threshold proposition that a waiver of sovereign immunity is necessary (Ala. Br. 26-28). They contend that there exists an exception to the general principle of sovereign immunity, not grounded in any statute, whereby an action seeking to force the federal government to pay money is permitted whenever the money would come from funds appropriated to a specific program. This Court's cases, however, support no such expansive exception. Such cases as *Miguel* v. *McCarl*, 291 U.S. 442 (1934), and *Roberts* v. *United States*, 176 U.S. 221 (1900), stand only for the proposition that courts can issue orders in the nature of mandamus to compel performance of a clear or ministerial duty to pay money. See Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 387, 403-404 (1970). It was the " 'ministerial' " nature of the duty to pay (rather than to impound) appropriated funds that allowed this Court to adjudicate *Train* v. *City of New York*, 420 U.S. 35 (1975), without a waiver of sovereign immunity (see 420 U.S. at 41 n.7). Neither *Train* v. *City of New York* nor any other decision of this Court can even remotely be read to stand for the proposition that intricate questions of statutory construction concerning the precise amount of federal funds to be paid to a particular claimant can be adjudicated without a waiver of sovereign immunity, simply because a general appropriation covers those funds. To the contrary, it remains "axiomatic that the United States may not be sued without its consent" (*United States* v. *Mitchell*, 463 U.S. 206, 212 (1983)), and a mere appropriation of funds to be used for a particular program hardly represents consent of the sovereign to all lawsuits involving those funds. The suggestion to the contrary in *Springdale Convalescent Center* v. *Mathews*, 545 F.2d 943, 950 (5th Cir. 1977), is in error.

a. (i) Respondent's principal argument is that, because it sought judicial review of an agency decision, respondent somehow did not seek "money damages" within the meaning of the APA (Resp. Br. 4, 21-22, 24, 32-34, 43-47, 62). This argument rests on a false dichotomy. "Judicial review" is a *means* by which an aggrieved party seeks to force the government to do something—to pay money, to conduct itself in a certain way, or to do both.[3] See generally *Hewitt* v. *Helms*, No. 85-1630 (June 19, 1987), slip op. 5. The APA's exclusion of "money damages" focuses not on the means but on the *end* the party seeks to achieve: sovereign immunity is waived if "money damages" are not sought; if money damages are sought then the party seeking them must look elsewhere for a waiver of sovereign immunity. The mere fact that the federal government's obligation to pay money can be made clear by a "reversal" of its decision that it is not obligated to pay does not convert the lawsuit into something other than an action for money.[4] If it did, then the exclusion of

[3] Thus, even though the Tucker Act applies only to cases in which the plaintiff seeks a money judgment (see Pet. Br. 18-20 & n.16), such an adjudication is often referred to as "judicial review." See, *e.g.*, *Heisig* v. *United States*, 719 F.2d 1153, 1156 (Fed. Cir. 1983) ("judicial review" of decision of Army Board for the Correction of Military Records); *Foote Mineral Co.* v. *United States*, 654 F.2d 81 (Ct. Cl. 1981) ("judicial review" of Interior Board of Land Appeals decision denying refund of mineral royalties); *Julius Goldman's Egg City* v. *United States*, 556 F.2d 1096 (Ct. Cl. 1977) ("judicial review" of determination by Secretary of Agriculture of fair market value of poultry for whose destruction he was statutorily obligated to compensate plaintiff); Brenner, *Judicial Review by Money Judgment in the Court of Claims*, 21 Fed. B.J. 179 (1961); see also *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983) ("judicial review" of decision of Board for Correction of Naval Records).

[4] For example, if the district court's judgments in this case had not been appealed, and petitioners had simply refused to pay the $11.3 million at issue for the 1978-1982 period, there can be no doubt that the district court would have regarded that refusal as contempt of court—even though the court never entered an order that said, in so many words, "pay the Commonwealth of Massachusetts" a specified sum of money. Respondent itself states that jurisdiction should not be based on "the bare possibility that the Secretary will contemn the judgment" (Resp. Br. 38), and that, of course, is exactly the point: the judgments entered by the district court in this case have precisely the same effect, unless the Secretary disobeys them, as money judgments.

"money damages" would be meaningless, and all complaints seeking the payment of money could be phrased so as to seek "judicial review" and "reversal" of the refusal to pay. Cf. Pet. Br. 21-23.[5]

A related argument contends that respondent's demand for payment of money somehow does not seek "money damages" because any actual payment by the federal government would take the form of an upward adjustment to respondent's future Medicaid grants (just as the recoupment of the amounts disallowed by the Grant Appeals Board took the form of a downward adjustment to a grant for a period long after the periods in which the disallowed amounts were paid). Amici suggest that this upward adjustment is "like a set-off" (Ala. Br. 25; see also N.Y. Br. 11 ("merely * * * a bookkeeping transaction")). That argument, however, is backwards. When the federal government invokes the process of the courts against someone who allegedly owes it money, and the alleged debtor asserts a right of setoff, then arguably no separate waiver of sovereign immunity is needed. See *Bull* v. *United States*, 295 U.S. 247, 261-262 (1935). But see *United States* v. *Shaw*, 309 U.S. 495, 503 (1940). This is not, however, a case instituted by the federal government to recover money from respondent. The federal government has already recouped the disputed money administratively. Rather, it is a case instituted by *respondent* to augment the amount of money that will be paid by the federal government to it.[6]

[5] The exclusion would likewise be rendered meaningless if the Court were to interpret the complaint in this case as "entirely prospective" (CSG Br. 7) on the ground that the redress it seeks (payment of money in the future), as opposed to the conduct said to give rise to a right to that redress (nonpayment of money in the past), has not yet occurred.

[6] Respondent and several amici assume that an action brought *before* the administrative recoupment took place would not be an action for "money damages" and that it therefore could proceed in district court. On the basis of that assumption, they then assert that it is anomalous to have jurisdiction turn on whether the lawsuit is instituted before or after the recoupment. Resp. Br. 65-66; Ala. Br. 9, 22-23; Calif. Br. 6; CSG Br. 8. If any such anomaly existed, it would be one of Congress's making and one for Congress, not the courts, to correct – if some correction were deemed appropriate. In fact, however, we do not think any distinction need be drawn between pre- and post-recoupment cases. In a pre-recoupment case as in a post-recoupment case, what is at issue is the size of a future payment to the State by the federal government. In both types of cases the plaintiff seeks, based on the legality of past conduct of the parties rather than future conduct, to require the federal government to pay more money than it would otherwise pay. Both kinds of actions therefore seek monetary relief that is excluded by the APA but contemplated by the Tucker Act.

(ii) The complaint in this case clearly seeks additional dollars from the federal government. Respondent and amici endeavor in several ways, however, to demonstrate that an award of such additional dollars under the Medicaid program is not "money damages" within the meaning of the APA.

The proper question to ask, of course, is what *Congress* meant by the term "money damages" in *this* statute. Thus, it is not sufficient to show that "damages" is sometimes used to distinguish one kind of money judgment from another. For example, in *Burlington School Committee* v. *Massachusetts Department of Education*, 471 U.S. 359 (1985), the Court held that a statute authorizing the reviewing court to "grant such relief as the court determines is appropriate" (20 U.S.C. 1415(e)(2)) was broad enough to permit a court to order reimbursement of certain expenditures. In distinguishing such reimbursement from "damages" (471 U.S. at 370-371), the Court was interpreting a statute that did not even use the word "damages," and the decision hardly sheds any light on what that word means in a different statute (the APA), in which it *was* used.

Likewise, it is not sufficient to postulate, without supporting legislative history, a questionable "common law" meaning of the word "damages" that *must* be what Congress had in mind, no matter what the contrary indications in the legislative history (see *Maryland Department of Human Resources* v. *Department of Health & Human Services*, 763 F.2d 1441 (D.C. Cir. 1985) (*MDHR* v. *HHS*); Ala. Br. 25-26; CSG Br. 9; N.Y. Br. 11-13, 17; but see Resp. Br. 68 n.14). Such an argument would have force if "money damages" were a term invariably used with precision to refer only to some well-defined subcategory of money judgments, so that any other usage by Congress would

be a misuse of the term. But, of course, that is not the case: "money damages" is a term regularly used, in Tucker Act jurisprudence and elsewhere, to mean all kinds of money judgments, including judgments requiring the payment of money previously owed but unpaid. See Pet. Br. 18-20 & n.16; *Edelman* v. *Jordan*, 415 U.S. 651, 668 (1974) (referring to an award of welfare benefits alleged to have been illegally withheld as "indistinguishable • • • from an award of damages against the State"); N.Y. Br. 12.

It is therefore necessary to look to the legislative history to discern Congress's meaning. Our opening brief showed that by excluding "money damages" from the APA's waiver of sovereign immunity, Congress meant to exclude all forms of monetary relief (Pet. Br. 24-34). Respondent and amici have produced no convincing contrary evidence.

Virtually the only reference to "damages" in the legislative history that respondent and amici cite is a passage from the memorandum on sovereign immunity that Professor Cramton prepared on behalf of the Administrative Conference. The passage is quoted in its entirety at N.Y. Br. 17. Although the State of New York and other amici (Ala. Br. 26 & nn.36 & 37) choose to emphasize only the sentences in this passage that refer to "compensat[ion] for harms done" and "money damages in tort and contract actions," neither sentence purports to say that this is *all* that is meant by the term "money damages" in the proposed statute. Rather, in the *very same passage* Professor Cramton wrote that "the language of our proposal, which is applicable in terms only to actions 'seeking relief other than money damages,' indicates that sovereign immunity remains as a defense to actions seeking monetary relief." *Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 139 (1970) [hereinafter *1970 Hearing*]. The passage as a whole confirms, rather than contradicts, the explicit statement earlier in the *same* memorandum that "*[a]ll* forms of monetary relief • • • are excluded from the recommendation" (*id.* at 118 (emphasis added)).

In addition, respondent and amici (Resp. Br. 56-57; Ala. Br. 11; N.Y. Br. 10, 15; CSG Br. 10-11) rely on the reference to federal grant-in-aid programs in the committee reports accompanying the 1976 amendments to the APA (S. Rep. 94-996, 94th Cong., 2d Sess. 8; H.R. Rep. 94-1656, 94th Cong., 2d Sess. 9).[7] But those references do not support an exception to the rule, stated throughout the rest of the legislative history, that the APA does not waive sovereign immunity for an action seeking monetary relief. Clearly, it is possible to challenge governmental administration of grant-in-aid programs on grounds that do not give rise to monetary relief.[8] It simply does not follow therefore that one must either adjust the definition of "money damages" in order to give meaning to these references in the legislative history, or create a limited exception for grant-in-aid programs to the otherwise general prohibition on awards of monetary

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[7] Amici Alabama, et al., misleadingly state that these references followed a decision by this Court holding that federal administration of grant-in-aid programs "could not be challenged under the Tucker Act" (Ala. Br. 11 (citing *Richardson* v. *Morris*, 409 U.S. 464 (1973)); cf. Resp. Br. 57 n.11). The cited decision said nothing of the kind. The plaintiffs had filed suit seeking *equitable relief*, and the district court predicated its jurisdiction on the Tucker Act. This Court wrote (409 U.S. at 465 (footnote omitted)):

> The Tucker Act plainly gives district courts jurisdiction over claims against the United States for money damages of less than $10,000 that are "founded . . . upon the Constitution." But the Act has long been construed as authorizing only actions for money judgments and not suits for equitable relief against the United States.

Consistent with the position we assert in this case, the Court's entire focus was on the nature of the relief sought, not the subject matter of the lawsuit.

[8] For example, an agency can simply fail to act on an application for federal funds, and a suit can be brought to compel the agency to act – one way or the other – on the application. In that situation, the court, if it agreed with the plaintiff, would compel the agency to *act* on the applications for funds but would not compel it to *pay* funds. Cf. *Sarasota* v. *EPA*, 799 F.2d 674 (11th Cir. 1986). Alternatively, those who deal with a particular federal grantee may wish to see the grantee cut off from federal funding unless it complies with certain environmental, social, or economic conditions. A lawsuit claiming that the federal government has a legal obligation to enforce such conditions or cut off funding would not seek the payment of money.

relief under the APA. The reference to grant-in-aid programs, after all, comes from the same Cramton memorandum discussed above (see *1970 Hearing* 121), and "Dean Cramton's memorandum, and the congressional reports based on it, should not be cited as implying propositions that they clearly reject." *Massachusetts* v. *Departmental Grant Appeals Bd.*, 815 F.2d 778, 783 n.3 (1st Cir. 1987).[9]

(iii) Respondent and amici make several other arguments in support of permitting respondent to seek a monetary recovery in district court, but these remaining arguments are tied barely, if at all, to the text and legislative history of the APA's exclusion of "money damages." For example, the briefs are replete with arguments to the effect that the Medicaid program has special attributes that assertedly make district court review more appropriate than Claims Court review (Resp. Br. 9 n.3, 26-28, 81-84, 91-93; Ala. Br. 6-8, 19-20; Calif. Br. 1-13; CSG Br. 21 n.13; Grimesy Br. 8-36; N.Y. Br. 3, 7-9). But whether or not Congress *should have* specified a procedure for judicial review of Medicaid disallowance decisions in district court, the fact is that it did not.[10] The task before the Court is to determine

[9] In addition to the Cramton memorandum, other portions of the legislative history discussed in our opening brief show that Congress intended the phrase "money damages" to mean all monetary relief and that those who sought monetary relief would be limited to such remedies as might be available under specific statutes or under the Tucker Act. Amicus the State of New York responds to one passage we quote – a statement by the Chairman of the Administrative Law Section of the American Bar Association (Pet. Br. 30) – by pointing out that the statement was originally drafted in support of a statutory proposal containing different language (N.Y. Br. 16). That is true, but the submission of this same statement in support of the Administrative Conference proposal (which eventually became 5 U.S.C. 702) demonstrates that the exclusion of "money damages" was not meant or understood to be narrower than the exclusion of "monetary relief or specific relief in lieu thereof" in the ABA proposal. To the contrary, the witness understood the language of the Administrative Conference proposal to be "precise statutory language" that would accomplish the same objectives as the ABA proposal (*1970 Hearing* 56).

[10] As we noted in our opening brief (Pet. Br. 6 n.4), in the early years under the Medicaid program the government took the position that the absence of a specific review provision, coupled with certain indications in the legislative history of 42 U.S.C. (& Supp. III) 1316(d), meant that judicial review of Medicaid disallowance determinations was precluded altogether. That argument was rejected in *County of Alameda* v. *Weinberger*, 520 F.2d 344, 347-349 (9th Cir. 1975). The government did not at that time advance, and the court did not consider, the additional argument that there was no waiver of sovereign immunity that would permit a district court as opposed to the Court of Claims (now the Claims Court) to order monetary redress for a disallowance decision. Given the lack of attention to this issue, there is no reason to believe that Congress, when it legislated generally on the subject of waiver of sovereign immunity in 1976, necessarily ratified all prior decisions allowing monetary actions to proceed in district courts. Even less persuasive is the argument of respondent (Resp. Br. 90) that the Federal Courts Improvement Act of 1982 (FCIA), Pub. L. No. 97-164, 96 Stat. 25, somehow ratified decisions (see Resp. Br. 52-53) that – without construing either the Tucker Act or the "money damages" exclusion in the APA – had found district court jurisdiction to review grant disallowance disputes. The FCIA did not substantively amend any of the statutory provisions on which we rely for the proposition that a plaintiff seeking money from the federal government must (in the absence of a specific waiver of sovereign immunity) proceed under the Tucker Act rather than the APA, and inferences from what is *not* said in the legislative history of the FCIA are quite unenlightening.

whether such review may be reconciled with the framework established by other statutes that provide generally for actions against the United States. And the two relevant statutes – the APA and the Tucker Act – look to the nature of the relief sought, not to the subject matter of the lawsuit, in order to allocate jurisdiction between the district courts and the Claims Court.

A theme that nevertheless runs throughout several briefs is the assertion that the Claims Court is a "specialized" tribunal whose jurisdiction depends on the subject matter of the lawsuit – that it is a forum for the resolution of government contracts disputes, civilian and military pay cases, and little else.[11]

[11] Respondent and several amici also disparage the Claims Court as a mere Article I tribunal, and they suggest in various ways that it somehow lacks the dignity to resolve important disputes to which a sovereign State is a party. The only issues before the Court, however, are issues of statutory interpretation. This Court is not asked to decide what jurisdiction the Claims Court and district courts should be assigned, but what jurisdiction they have been assigned, and observations about the source of constitutional authority for those courts do not advance the analysis. Nor does the sovereignty of the States give

But no such limitation can even remotely be found in the words of the Tucker Act (see Pet. Br. 3-4). It is certainly true that "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act" (*United States* v. *Mitchell*, 463 U.S. at 216). But the limitations have to do with the form of relief sought and the content of the relevant statute. There is no general principle excluding from the ken of the Tucker Act grant-in-aid disputes, or Medicaid disputes, or disputes about "important social policies and programs" (N.Y. Br. 3; cf. Resp. Br. 39-42), or disputes about any other subject on which Congress has enacted a statute that "can fairly be interpreted as mandating compensation by the Federal Government" (*Mitchell*, 463 U.S. at 217 (citations and internal quotation marks omitted)).[12] And although the staple of the Claims Court's work admittedly has been government contracts cases, pay cases, and a few other recurrent categories, Tucker Act courts have adjudicated a wide variety of other controversies.[13]

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them any right to sue the United States other than the rights conferred by statutes consenting to suit. See *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983); *Hawaii* v. *Gordon*, 373 U.S. 57 (1963); *Minnesota* v. *United States*, 305 U.S. 382 (1939). In any event, there is no question in this case of depriving anyone of an Article III forum. Claims Court decisions can be appealed under 28 U.S.C. 1295(a)(3) to the United States Court of Appeals for the Federal Circuit, which is an Article III tribunal (see S. Rep. 97-275, 97th Cong., 2d Sess. 2 (1982)).

[12] Indeed, this Court wrote in *Mitchell* that the Tucker Act "makes absolutely no distinction between claims founded upon contracts and claims founded upon other specified sources of law" (463 U.S. at 216).

[13] See, *e.g.*, cases cited in note 3, *supra*; *Chula Vista City Sch. Dist.* v. *Bennett*, 824 F.2d 1573 (Fed. Cir. 1987) (federal Impact Aid to local educational agencies), cert. denied, No. 87-909 (Jan. 25, 1988); *Spokane Valley Gen. Hosp.* v. *United States*, 688 F.2d 771 (Ct. Cl. 1982) (Medicare reimbursement); *Whiteciff, Inc.* v. *United States*, 536 F.2d 347 (Ct. Cl. 1976) (Medicare reimbursement), cert. denied, 430 U.S. 969 (1977); *New York Airways, Inc.* v. *United States*, 369 F.2d 743 (Ct. Cl. 1966) (subsidies for transportation of mail under order of Civil Aeronautics Board); see also *Bakersfield City Sch. Dist.* v. *Boyer*, 610 F.2d 621, 627-628 (9th Cir. 1979). The opinion of Justice Harlan in *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), observed that "[t]he cases heard by the Court [of Claims] have been as intricate and far-ranging as any coming within the federal-question jurisdiction * * * of the District Courts" (370 U.S. at 556-557; see also *id.* at 573-574).

Thus, it is not in the least unnatural to believe that Congress, in enacting the 1976 amendments to the APA, did what the legislative history indicates it intended to do: open the district courts up to actions not seeking monetary relief, but leave non-tort money cases, whatever their subject matter, governed by the Tucker Act (see Pet. Br. 31-32). Although the legislative history cites contract cases most frequently as an *example* of Tucker Act cases left unaffected by the new Section 702, this natural emphasis on the most familiar kind of Tucker Act case hardly means (see Resp. Br. 64-65, 102; Ala. Br. 26 n.37; N.Y. Br. 13 n.9; CSG Br. 16) that those are the only cases that the APA's waiver of sovereign immunity does not reach.

b. As we argued in our opening brief (Pet. Br. 34-35), even if respondent's action is not a request for "money damages" within the meaning of the APA, it would be inappropriate—at least insofar as respondent seeks a judgment that would directly enable it to obtain $11.3 million in Medicaid reimbursement for years past—to allow respondent to sue under the APA, because respondent could obtain the same judgment from the Claims Court (assuming the correctness of its position on the merits).[14] Thus, this is not a case involving "final agency action for which there is no other adequate remedy in a court" (5 U.S.C. 704).

Respondent and amici respond to this argument in two ways. First, they contend that Section 704 does not really mean what it says, that "nonstatutory" APA review is available only when there is no other adequate remedy in a court (Resp. Br. 71-72; N.Y. Br. 6-7, 17 n.11). Second, they surprisingly contend that the Claims Court would not have jurisdiction, so that the Tucker Act remedy is inadequate because it is nonexistent (Resp. Br. 29-30, 97-99; cf. Ala. Br. 24 n.34).

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[14] For purposes of jurisdictional arguments, we of course assume that respondent has a meritorious claim. It is by no means true, however, that "[t]he Secretary no longer disputes that the Medicaid statute covered the services the Commonwealth provided to mentally retarded citizens" (CSG Br. 6). If the court of appeals is held by this Court to have jurisdiction, then we will of course be bound by its determinations. But we believe that the court lacked jurisdiction, and if this Court agrees then we intend to litigate the merits vigorously in the Claims Court, which does have jurisdiction.

However, notwithstanding dicta in *Massachusetts* v. *Departmental Grant Appeals Bd.*, 815 F.2d at 784, there is no basis for reading Section 704 as a mere requirement of exhaustion of administrative remedies and ripeness, rather than what it purports to be: a statute precluding nonstatutory review under the APA when there exists another adequate remedy in a court. See, *e.g.*, *Council of the Blind* v. *Regan*, 709 F.2d 1521, 1531 (D.C. Cir. 1983) (en banc) (reading Section 704 literally). The legislative history of this provision is quite scanty. See S. Doc. 248, 79th Cong., 2d Sess. 8, 37-38, 213, 276-277 (1946) (reprinting committee reports). It certainly supports the proposition that *one* purpose of Section 704 was to codify requirements of exhaustion and ripeness. But nowhere does it say, or even intimate, that this was its *only* purpose. Moreover, there can be no claim that the literal reading is nonsensical or inconsistent with any other provision of the APA. Congress could quite reasonably conclude that nonstatutory review should be confined to cases of true necessity – where there is "no other adequate remedy in a court" – since a broader form of nonstatutory review might render redundant or otherwise interfere with carefully limited provisions for statutory review.

The contention that no Tucker Act remedy exists in this case is also without foundation. Far be it from us to "ignore[] the rule that in 'determining the general scope of the Tucker Act, this Court has not lightly inferred the United States' consent to suit' " (Resp. Br. 97-98 (quoting *Mitchell*, 463 U.S. at 218)). But "there is simply no question that the Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages" (*Mitchell*, 463 U.S. at 218).[15] And respondent's statutory sub-

[15] We showed in our opening brief (Pet. Br. 18-20) that whatever the term "money damages" means under the APA, this term clearly encompasses all claims for monetary relief when used to describe the prerequisite to Tucker Act jurisdiction. See *United States* v. *Jones*, 131 U.S. 1 (1882); *MDHR* v. *HHS*, 763 F.2d at 1447; *Pauley Petroleum, Inc.* v. *United States*, 591 F.2d 1308, 1315-1316 (Ct. Cl. 1979). Respondent ignores this portion of our brief in its repeated assertions (Resp. Br. 29, 60-61, 69-70, 99) that we have argued that term has the same meaning under both Acts and that therefore a narrow

stative right to repayment for valid Medicaid expenditures could not be clearer: "the Secretary • • • shall pay" the money under 42 U.S.C. 1396b(a) when the State has a valid claim for reimbursement.[16] If the Medicaid Act did not mandate the payment

meaning of "money damages" in APA jurisprudence would necessarily require an equally narrow meaning of the term as used in Tucker Act jurisprudence.

United States v. *Mottaz*, 476 U.S. 834 (1986), does not redefine the term "money damages" in any way that makes a Tucker Act remedy unavailable in this case. The facts of *Mottaz* were sui generis: the plaintiff claimed title to a disputed parcel of land, and she sought the two-step remedy of recognition of her title followed by a required purchase of the land by the government, a remedy "appropriate" on the particular facts of that case because of the location of the land within a national forest (476 U.S. at 851). The Court therefore drew a distinction between "damages for the Government's past acts, the essence of a Tucker Act claim for monetary relief," and the unusual forward-looking remedy sought by the *Mottaz* plaintiff (*ibid.*). The Court said nothing to indicate that it was adopting a general redefinition of the word "damages," which in prior Tucker Act cases has been used to encompass all forms of monetary relief for the federal government's past acts.

[16] The determination whether a statute can fairly be read as mandating compensation is not, as the District of Columbia Circuit recently suggested, the same as the question whether Congress intended to create an "implied cause of action" in that statute. See *National Ass'n of Counties* v. *Baker*, No. 87-5287 (D.C. Cir. Mar. 11, 1988), slip op. 10; see also *MDHR* v. *HHS*, 763 F.2d at 1450-1451. "If the source of the substantive right can be fairly read as mandating compensation by the Government, it is needless for Congress to add expressly in that statute that suit may be maintained in this court (or elsewhere) to obtain such monetary compensation. The Tucker Act • • • perform[s] that function of giving Congressional consent to jurisdiction in this court over such pecuniary claims. Classic instances of legislation directing compensation, and therefore grounding suit in this court, are the statutes providing for military and civilian pay and allowances (which have not, of course, themselves mentioned suit or the right to sue)." *Mitchell* v. *United States*, 664 F.2d 265, 268 (Ct. Cl. 1981) (footnote omitted), aff'd, 463 U.S. 206 (1983), see *id.* at 281 (Nichols, J., concurring and dissenting) ("The Supreme Court obviously never intended to withdraw jurisdiction over a class of case where legislation other than the Tucker Act can be said • • • to 'mandate compensation' in money. The references • • • to 'money damages' in connection with rights created outside the Tucker Act • • • [are] a shorthand way of saying the other legislation must mandate the payment of money in terms readily expressible as money damages in case the mandated duty is not performed."). As our petition for a writ of certiorari in *Mitchell* said (at 14): "[T]he Court of Claims • • • reasoned • • • that the necessary consent to suit may be inferred from a

of money by the federal government, it is hard to see how respondent would have *any* legally enforceable rights of the sort it asserts in this lawsuit.

2. If we have succeeded in showing that the interplay of the APA and the Tucker Act requires that respondent's request for monetary relief be adjudicated in the Claims Court rather than the district court, then the Court must decide the second question presented: whether that statutory division of jurisdiction—actions seeking money in the Claims Court, actions seeking relief other than money in the district court—allows a single lawsuit seeking both monetary relief and prospective relief to be split into two actions, with the district court taking jurisdiction over the "prospective" part of the suit and the Claims Court over the "retrospective" part. Such claim splitting, by allowing the district court to resolve all common legal issues in the course of considering the plaintiff's request for declaratory or injunctive relief, which resolution then becomes binding on the Claims Court by operation of collateral estoppel,[17] effectively nullifies the congressional objective of centralizing the adjudication of claims for money damages against the United States in a single forum. In addition, claim splitting will inevitably give rise to confusion, delay, intercircuit conflicts, and forum shopping. We showed in our opening brief that this simply could not have been Congress's intent (Pet. Br. 38-43), that 5 U.S.C. 704 precludes such an assertion of district court jurisdiction because

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statute that directs payment of a particular sum of money to an individual. With this we have no quarrel, for a statute that creates a right to payment of money can fairly be interpreted as mandating the availability of a damages remedy; without the damages remedy the substantive right would be empty. See, *e.g.*, *United States* v. *Hvoslef*, 237 U.S. 1, 10 (1915); *Medbury* v. *United States*, 173 U.S. 492, 497 (1899) • • •."

[17] We observed in our opening brief that res judicata principles usually prohibit a plaintiff from first asserting his equitable claims in one action and then seeking money in a separate action (Pet. Br. 39 n.33). The District of Columbia Circuit recently agreed that preclusion of such belated money claims "would appear to be the expected result under black letter principles." *Vietnam Veterans of America* v. *Secretary of the Navy*, No. 86-5547 (D.C. Cir. Mar. 29, 1988), slip op. 13.

(at least in the circumstances of this case) respondent's Tucker Act remedy is "adequate" (Pet. Br. 43-44), and that 5 U.S.C. 702(2) precludes such an assertion of district court jurisdiction because the Tucker Act "impliedly forbids" the nonmonetary relief sought (Pet. Br. 44-46).

Respondent has done much to confirm that the only relief needed or appropriate on the facts of this (or any similar) case is available from the Claims Court. Respondent recognizes that the district court entered no injunction (Resp. Br. 19). Nor did the court of appeals do so. Therefore, what would restrain petitioners from taking action inconsistent with the decisions below is not any threat of contempt for disobeying an injunctive order, but instead the stare decisis effect of the reasoning of those decisions. Respondent also acknowledges that it was satisfied with the relief it obtained below, and that nothing else was necessary to accomplish the purposes of this lawsuit (*id.* at 21-22, 32-33, 35, 68 & n.14). What respondent fails to acknowledge, however, is that the very same relief is and was available from the Claims Court in the form of a money judgment and/or remand, and the accompanying statement of law that would bind petitioners in their future dealings with respondent. Any decision by the Claims Court would have no less and no more of a restraining effect than the judgments entered by the courts below. See *King* v. *United States*, 390 F.2d 894, 905 (Ct. Cl. 1968) ("Any judgment of this court will inevitably have a restraining effect upon Government operations. This is true of money judgments • • •. A judgment awarding money to a particular plaintiff can be authoritative information to officials that their conduct was unlawful and that, unless their position is altered, similar judgments may be rendered in the future."), rev'd on other grounds, 395 U.S. 1 (1969).

In these circumstances, it is simply wrong to describe the relief available in the Claims Court as anything short of "complete" (CSG Br. 20). It is equally wrong to maintain that "[t]he Tucker Act remedy • • • is wholly inadequate because the Claims Court cannot provide the declaratory and injunctive relief available in the district court" (Ala. Br. 12; see Resp. Br. 72). Respondent and amici have confused the question whether

the Claims Court can provide the *same* relief with the question posed by the APA, which is whether the Claims Court can afford an "*adequate* remedy" (5 U.S.C. 704 (emphasis added)). See *Council of the Blind* v. *Regan*, 709 F.2d at 1532 (distinguishing proposition that relief plaintiffs sought under the APA was "*more effective*" from the Section 704 criterion that non-APA relief be "*inadequate*").

Consequently, the efforts by respondent and amici to show that the Claims Court does not have the same equitable powers as the district court (Resp. Br. 72-76; Ala. Br. 12-15; CSG Br. 11-14)—although correct in some respects—are quite beside the point.[18] Congress's deliberate decision not to give the Claims

[18] Although the powers of the Claims Court are indeed limited in some important ways, they are not as limited as respondent and amici argue. The court has the power "[i]n any case within its jurisdiction" to "remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just" (28 U.S.C. 1491(a)(2)). Respondent and amici correctly note that this power was not intended to allow the Claims Court to enter declaratory and injunctive relief, but they are incorrect in asserting that the power is one that can only be exercised in government contract cases (Resp. Br. 75; Ala. Br. 14 n.18). The impetus for this provision was a set of problems that had arisen in government contract cases (see S. Rep. 92-1066, 92d Cong., 2d Sess. 3 (1972); H.R. Rep. 92-1023, 92d Cong., 2d Sess. 4 (1972)), but the committee reports that respondent and amici cite contain no hint that the congressional intention was to *limit* use of the remand power to such cases, despite the plain language allowing remand in *any* case within Claims Court (then Court of Claims) jurisdiction. And in fact, the Court of Claims and Claims Court have frequently used this remand power in cases other than government contract disputes. See, *e.g.*, *Rothman* v. *United States*, 219 Ct. Cl. 595, 598 & n.5 (1979) (remand to Department of Health, Education, and Welfare in action for Medicare reimbursement); *Hoopa Valley Tribe* v. *United States*, 596 F.2d 435, 447 (Ct. Cl. 1979) (dictum) (in action to recover timber royalties court has power to order remand to Secretary of the Interior); *Gratehouse* v. *United States*, 512 F.2d 1104, 1112 (Ct. Cl. 1975) (remand to Civil Service Commission in action for reinstatement and backpay); *Long* v. *United States*, 12 Cl. Ct. 174, 176, 177 (1987) (remand to Air Force Board for the Correction of Military records in military pay case); *Harris* v. *United States*, 8 Cl. Ct. 299, 303 (1985) (same); see also *Erika, Inc.* v. *United States*, 634 F.2d 580, 591 (Ct. Cl. 1980) (remand to insurance carrier in Medicare reimbursement dispute), rev'd on other grounds, 456 U.S. 201 (1982). Of course, the Claims Court cannot bring a case within its jurisdiction

Court full equitable powers should be treated as a reason not to afford injunctive and declaratory relief at all, not as something that, ipso facto, renders the Claims Court an inadequate forum in which to litigate any dispute about money that also has implications for the future.

We said in our opening brief that, "[a]lthough the matter is not entirely free from doubt, we believe that plaintiffs also may waive *all* monetary recovery—permanently forgoing any Tucker Act claim arising out of prejudgment events—and thereby litigate their cases for nonmonetary relief in the district court and regional court of appeals" (Pet. Br. 15 n.11). The "doubt" to which we referred arises because it is unclear whether the adequacy of other remedies should be determined before or after the waiver. Before the waiver, the plaintiff has a Tucker Act remedy in the Claims Court, where he could secure any monetary recovery coupled with a determination of the law applicable to his situation. After the waiver, however, it is clear that the only available remedy is in district court.

Perhaps we were overly generous in suggesting that that doubt should be resolved in favor of viewing the plaintiff's situation after the waiver rather than before, but for two reasons we continue to believe that this is the better view. First, a plaintiff who waives all monetary recovery in order to have access to the declaratory and injunctive powers of the district courts demonstrates in a convincing fashion that he has a genuine need for the exercise of those powers. Second, when a court grants injunctive or declaratory relief that goes *solely* to future conduct of the parties, and cannot be used to impose monetary liability of the federal government for past conduct, the principal defect associated with claim splitting—that it nullifies Congress's purpose to centralize money claims against the United States (other than those for which there exists a

by the technique of remanding with directions to award nonmonetary relief that is a prerequisite to monetary relief. *United States* v. *Testan*, 424 U.S. 392, 404 & n.7 (1976). But there is no opportunity for such bootstrapping in this case; respondent seeks and is entitled to the payment of money if the services at issue were covered by the Medicaid statute.

specific waiver of sovereign immunity)—is not implicated, and there is no particular reason to remit the plaintiff to the forum that was set up to give the plaintiff relief that he does not need or want.

But whatever the merits of our supposition that plaintiffs in other situations can invoke the jurisdiction of the district court by waiving their claims to accrued money damages, this issue is not presented by the case before the Court. Respondent has not waived its accrued money claim and has done nothing else to demonstrate a genuine need for any forward-looking relief beyond the binding statement of the law that the Claims Court can provide in the course of adjudicating the claim for past-due money. In these circumstances, it would be quite incorrect and would undermine congressional intent to treat respondent's ability to proceed in the Claims Court as anything less than an "adequate remedy in a court" (5 U.S.C. 704) and to allow preemption of the Claims Court in the manner accomplished by the court of appeals in this case.

For the foregoing reasons and those given in our opening brief, the judgments of the court of appeals should be affirmed in part and reversed in part, and the cases should be remanded with directions to vacate the judgments of the district court in their entirety and to transfer the cases to the Claims Court pursuant to 28 U.S.C. 1631.[19]

Respectfully submitted.

CHARLES FRIED
Solicitor General

APRIL 1988

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[19] We note that, whatever the resolution of the jurisdictional issues before this Court, it would not be appropriate for the Court to do as respondent suggests and remand "with instructions to reinstate the judgments of the district court" (Resp. Br. 105; see also CSG Br. 26). Despite agreeing with the district court on the basic legal question presented by the case, the court of appeals, for reasons independent of jurisdictional defects, found those judgments infirm in part (Pet. App. 7a n.2).

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liable to program beneficiaries. The claim is entirely contingent: that if the court holds the state liable to program beneficiaries, the court should require HHS to provide federal financial participation for the resulting costs.

Further, under United States v. King, 395 U.S. 1, 3 (1968), a Tucker Act claim must be for "actual, presently due money damages." A state's third-party complaint can allege no certain sum. This is not a matter of artful pleading. No amount is "actually, presently due" from HHS. The district court's final order cannot specify an actual, presently due amount, because the court cannot adjudicate an amount. Typically, the state will not know the amount of its claim for federal financial participation until class members complete a claiming process. This may be months or years after completion of proceedings on the merits of the case. The court can only resolve the principle of entitlement to

federal financial participation. This is far from the "actual, presently due" standard of King.

The fact that a declaration of a state's right to federal financial participation may eventually lead to the payment of money is not enough to make it a claim for money damages. "A district court does not lose jurisdiction over a claim for non-monetary relief simply because it may later be the basis for a money judgment." Laguna Hermosa Corp. v. Martin, 643 F.2d 1376, 1379 (9th Cir. 1981) (action seeking declaration of contract rights against United States not a Tucker Act action); Rowe v. United States, 633 F.2d 799 (9th Cir. 1980), cert. denied, 451 U.S. 970 (1981) (action to compel award of oil and gas leases not a Tucker Act claim).

To date, HHS has limited its claim to asserting that the portion of the third party complaint seeking federal participation in the cost of back benefits arises

under the Tucker Act. However, it seems impossible to draw a viable distinction between the claims for participation in prospective relief and back benefits. In both situations, the claim has fiscal consequences, but does not meet any traditional notion of money damages.

We are aware of no case in which an action seeking to direct the government to pay an unspecified amount at an unspecified time in the future for expenses not yet incurred was held to arise under the Tucker Act. In this sense, the third party complaint is distinguishable from a disallowance case, where a state seeks to recover a sum certain based on a specific past act of HHS. However this Court resolves the disallowance issue in the pending case, the Court's opinion should make clear that the Tucker Act does not extend to the circumstance of a state's third party complaint against HHS in beneficiary/state litigation.

C. A finding that the Tucker Act divests a district court of jurisdiction in the Social Security Act third party complaint litigation would cause severe problems of judicial and program administration.

There are strong policy reasons to resolve any uncertainty against finding that the Tucker Act divests district courts from jurisdiction in Social Security Act third party complaint litigation. To the extent that a finding that the district court is without jurisdiction in the disallowance context could lead to a comparable result in the third party complaint context, these policy reasons should militate against finding the district court divested from jurisdiction in the case before the court.

Initially, it is important to recognize that the real dispute is not about whether issues concerning Social Security Act program administration are subject to judicial review; it is about where review

should take place. If the position of the states and program beneficiaries is adopted, a district court can hear the state's third party complaint along with the primary case between beneficiaries and the state, and all issues can be appealed to the appropriate regional circuit. If HHS is correct, the state's third party complaint must go to the Claims Court, with exclusive appellate jurisdiction in the Federal Circuit Court of Appeals. 28 U.S.C. §1295(a)(3).

Adoption of HHS' position would have two undesirable policy impacts: it would lead to fragmented litigation in multiple forums, and it would shift many of the most fundamental issues regarding beneficiary rights and operation of federal grant-in-aid programs from district courts and regional courts of appeals to the Claims Court and the Federal Circuit Court of Appeals. These effects become apparent by considering the impact of a finding that

the Claims Court has exclusive jurisdiction over part or all of a state's third-party complaint.

i. HHS' Position would result in multiple forums and duplicative litigation.

HHS' position would result in duplicative litigation in multiple forums whenever program beneficiaries seek prospective and retroactive relief, and the state files a third party complaint against HHS.

If a court accepted HHS' position that a state claim for FFP for back benefits must be heard in the Claims Court, there would be two possible procedural results. Either the third party complaint would be bifurcated and the back benefits part sent to the Claims Court, or the entire third party complaint sent to the Claims Court. As all parties seem to recognize, bifurcation is undesirable because it results in duplication, confusion, and difficult issues of collateral estoppel. However, even if the entire third party complaint is

sent to the Claims Court, there will still be an unresolvable bifurcation problem.

First, consider the effects of bifurcating the third party complaint. Since issues concerning back benefits are usually substantially identical to those concerning prospective relief,[5] bifurcation at the district court/Claims Court level would merely waste resources. Either one court would consider itself bound by the decision of the other, or each court would consider itself free to consider the merits of the underlying dispute without regard for the other. In either case, no policy would be served by this duplicative litigation.

Even if one court deferred to the other at the trial court level, what would happen on appeal? Conceivably, there could

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[5] Grimesy is atypical in one respect: HHS raised independent defenses to whether it must join in the cost of paying back benefits while no longer defending on the merits of the case. Usually, the legal issues that determine entitlement to prospective relief also determine entitlement to back benefits.

be appeals from either beneficiaries or the state in the primary case; those appeals would go to the regional court of appeals. There could also be appeals from either HHS or the state concerning the third party complaint. Would appeals concerning prospective relief go to the regional circuit and appeals concerning retroactive relief go to the Federal Circuit? If so, how would the two courts of appeal be expected to administer simultaneous appeals on overlapping issues involving the same case? The possibilities for conflict are apparent.

The Grimesy litigation demonstrates that these concerns are real. In Grimesy, HHS initially appealed the order for prospective relief to the Ninth Circuit. It only dismissed the appeal after it concluded that congressional legislation made its appeal moot. Six months after appealing the prospective order to the Ninth Circuit, HHS appealed the order

concerning retroactive benefits to the Federal Circuit.[6] If the first appeal were still pending, would HHS expect both appeals to proceed simultaneously? If the legality of HHS' regulation was relevant to both prospective and retroactive relief, could both appellate courts decide it? Should one court defer to the other? Moreover, what if the beneficiaries had objected to some part of the order for retroactive relief, and also appealed? What if the state appealed either the order for prospective relief, or retroactive relief, or both? Both appellate courts would be asked to resolve identical issues with overlapping parties in components of the same case at the same time. The possibilities for chaos are tremendous under HHS' construction.

The alternative to bifurcating the

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[6] HHS also appealed this order to the Ninth Circuit, but (subsequently) denominated this appeal as a "protective" appeal.

state's third party complaint would be for the Claims Court to exercise pendent jurisdiction over the entire third party complaint. But this would not resolve the procedural morass.

Necessarily, the third party complaint would be bifurcated from the beneficiaries' action against the state, because the Claims Court could not exercise pendent party jurisdiction over the beneficiaries' action. See Uram v. United States, 216 Ct. Cl. 418, 420 (1978) (Court of Claims cannot render judgment against third party unless that party makes claim for money against U.S. or U.S. makes claim for money against third party).

Assuming the third party complaint was bifurcated, which action would proceed first? Logically, the beneficiaries' action should proceed, since the state's third party complaint is wholly contingent. But the state would undoubtedly contend that it is merely following the directions

of the federal government, and that the real dispute is between beneficiaries and HHS. Since HHS is no longer a party in the district court, and beneficiaries cannot be parties in the Claims Court, there is no forum for resolution of their dispute.

Whichever case proceeded first, there would still be the problem of appellate sequence and duplication. Would there be simultaneous appeals in the regional and Federal Circuit? Should one defer to the other? The only alternatives would be for one appellate court to rubber-stamp the other's decision, or risk conflicting decisions by two appellate courts in the same case.[7]

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[7] Under some circumstances, there might even be three appellate courts involved in the same case. In the Grimesy litigation, plaintiffs initially filed their complaint for prospective relief and back benefits in state court, and the state removed the action to federal court. The state agreed to waive the Eleventh Amendment, so that the federal court could issue any back benefit award. Had the state not done so, the federal court would have lacked jurisdiction over the back benefit

(continued...)

These convoluted procedural difficulties are not hypothetical. Grimesy illustrates how they can and will occur if the state third party complaint is held to be, in whole or in part, beyond the jurisdiction of the district court.

ii. HHS' Position would have the effect of creating a national trial court and a National Court of Appeals for Social Security Act litigation.

HHS' position is also undesirable because it would have the effect of centralizing much Social Security Act litigation in the Claims Court and Federal Circuit Court of Appeals. If the basic issues concerning operation of grant-in-aid programs are all centralized in the Claims

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[7](...continued)
claim, Edelman v. Jordan, 415 U.S. 651 (1974), and would have had to remand that claim to state court. At that point, the case could have generated decisions on closely related issues by the state appellate court, regional circuit court of appeals, and Federal Circuit Court of Appeals.

Court and Federal Circuit, the federal judicial structure will be seriously disrupted.

First, neither the Claims Court nor the Federal Circuit Court of Appeals purport to have expertise in issues concerning the grant-in-aid programs under the Social Security Act. In contrast, the district courts and regional courts of appeals have decades of experience in considering such issues.

Second, there is no evidence that Congress, in enacting the Federal Courts Improvement Act of 1982, P. L. No. 97-164, 96 Stat. 25, suggested any expectation that the Claims Court and the Federal Circuit Court of Appeals would now become the primary forums for resolution of issues under the Social Security Act grant-in-aid programs. Indeed, there is not even a reference to such a possibility in the

legislation or its history.[8]

Third, the beneficiaries of Social Security Act programs are typically the poorest members of our society. They would be the most disadvantaged if they were routinely compelled to litigate appellate claims in Washington, D.C. When low income people can obtain representation in civil matters, the representation is typically from legal services organizations with very limited budgets. If significant numbers of the cases necessitate the expense of

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[8] It appears that all of the cases considering the applicability of the Tucker Act to the Social Security Act grant-in-aid programs have arisen after the enactment of the Federal Courts Improvement Act of 1982. See, e.g., Commonwealth of Massachusetts v. Departmental Grant Appeals Board, 815 F.2d 778 (1st Cir. 1987); Maryland Dept. of Human Resources v. Dept. of Health and Human Services, 763 F.2d 1441 (D.C. Cir. 1985); State of Minnesota by Noot v. Heckler, 718 F.2d 852 (8th Cir. 1983). If the United States had envisioned that the Claims Court and Federal Circuit would become major forums for Social Security Act litigation, it is hard to understand why the suggestion was never made to Congress while the FCIA was under consideration.

litigating in Washington, the cost will necessarily reduce resources available for representation in other cases. The original rationale for allowing concurrent district court jurisdiction over Tucker Act claims not exceeding $10,000 was so that litigants with small claims not be forced to expend the resources of litigating in Washington, D.C. It is fundamentally inconsistent with that goal to shift Social Security Act litigation away from local courts to centralized adjudication in Washington.

Fourth, the Claims Court is not only an inconvenient forum for indigent plaintiffs; it also lacks the protections of an Article III court. Its members do not have life tenure, and depend on executive renomination and Congressional reapproval to maintain their positions. This makes it a particularly inappropriate forum for low income persons, who must often bring politically controversial suits seeking to

protect or establish their rights.

Finally, there may be some areas of law where the advantages of resolution in a single forum outweigh the advantages of presenting the issues to various district and appellate courts, but Social Security Act litigation is not such an area. Numerous issues regularly arise under the Act regarding eligibility, benefits, financial determinations, and local administrative practices. Under our federal appellate structure up to now, it has been possible for these issues to be litigated in various forums, so that this Court need only address the issues where conflicts arise in the circuits, or the issues are of exceptional importance. If these cases are centralized in the Claims Court and Federal Circuit, then there will be no opportunity for the winnowing process that normally occurs as issues are heard by a number of courts. Instead, this Court will be forced to either intervene after initial decisions

by a single appellate court, or to leave in the hands of that single court fundamental decisions on areas of crucial concern to low income citizens who rely on the Social Security Act programs.

II. An expansive construction of the Tucker Act raises troublesome implications in other areas of law affecting federal program beneficiaries.

A. Federal Housing Programs

The federal government's contention that any claim that may result in money damages belongs in the Claims Court is not limited to the Social Security Act disallowance context. The government has also raised the Tucker Act issue in cases involving claims by program beneficiaries under the nation's housing laws.[9] It is

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[9] See Thomas v. Pierce, 662 F. Supp. 519 (D. Kan. 1987), appeal pending, Case No. 87-2121 (10th Cir.); Mann v. Pierce, 803 F.2d 1552 (11th Cir. 1986); Conille v. Pierce, 649 F. Supp. 1133 (D. Mass. 1986), aff'd, No. 87-1120 (1st Cir., Feb. 19, 1988); Committee for Fairness, et al., v. Pierce, C.A. No. 87-0324 JHP (D.D.C.); (continued...)

appropriate for the Court to be aware of both the sweeping nature of the government's efforts to redefine the federal judicial scheme, and of the dramatic impact such alteration would have on the right of program beneficiaries to seek redress for grievances historically entertained by the district courts.

Housing cases are often brought in federal district court by tenants or homeowners seeking judicial review of a U.S. Department of Housing and Urban Development (HUD) or Farmers Home Administration (FmHA) decision which has adversely impacted on their right to receive specified housing benefits under the federal housing statutory scheme.[10] While the litigation may result in the expendi-

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[9](...continued)
Council of Large Public Housing Authorities v. HUD, C.A. No. 82-1210 NHJ (D.D.C.).

[10] See cases cited in n.9, supra, and n.12, infra.

ture of monies by HUD or FmHA, this result is secondary to the primary goal of establishing the federal agency's duty to act in a specified manner. Thus, the immediate and prerequisite relief sought is declaratory or injunctive relief.

Nevertheless, as demonstrated below, the federal government's position has been that the plaintiffs must pursue such claims in the Claims Court because the claim will have financial consequences, and that no other independent source of waiver of sovereign immunity exists or is applicable. The following case is illustrative.

In Thomas v. Pierce, 662 F. Supp. 519 (D. Kan. 1987) appeal pending, No. 87-2121 (10th Cir. 1988), low-income tenants sought judicial review of HUD's actions in selling a low-income housing project with only partial subsidy, effectively removing two-thirds of the units from lower-income

use.[11] As in numerous similar cases heard by federal district courts since 1975,[12] plaintiffs sought judicial review pursuant to the Administrative Procedure Act (APA)

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[11] In 1978 Congress enacted legislation establishing standards governing the disposition of HUD-owned multi-family properties. See Housing and Community Development Amendments of 1978, 12 U.S.C. §1701z-11. HUD implemented regulations requiring, inter alia, that formerly subsidized projects, such as the one in Thomas, be sold in a manner to ensure their preservation as decent and affordable housing. 24 C.F.R. §§290.25(b), §290.27(b) (1987).

[12] Both before and after passage of the Housing and Community Development Amendments of 1978, HUD's property disposition decisions have been challenged in court, with cases brought before the 1978 legislation claiming that HUD had not complied with the National Housing Act or national housing goals. See Russell v. Landrieu, 621 F.2d 1037 (9th. Cir. 1980); Tenants for Justice v. Hill, 413 F.Supp. 389 (E.D. Pa. 1975). After Congress codified and expanded these judicial holdings in 1978, HUD's actions continued to be challenged. See Frisby v. HUD, 755 F.2d 1052 (3d Cir. 1985); Paris v. HUD, 713 F.2d 1341 (7th Cir. 1983), subsequent decision sub nom Cowherd v. HUD, 827 F.2d 40 (7th Cir. 1987). Until Thomas, the federal government had not taken the position that the Tucker Act provided exclusive jurisdiction to the Claims Court for claims under the property disposition provisions of the Act.

(5 U.S.C. § 706). Plaintiffs requested declaratory and injunctive relief to require HUD to comply with the statute and regulations, and require HUD to repurchase the project and reprocess it with the required rental subsidies.[13]

In Thomas, the District Court dismissed the case, accepting the federal government's contention that neither 5 U.S.C. §702 of the APA nor 12 U.S.C. §1702 or 42 U.S.C. §1404 of the housing statutes waived HUD's sovereign immunity. Plaintiffs appealed to the Tenth Circuit, where the federal government for the first time contends that the APA waiver is also unavailable because under the Tucker Act, the Claims Court is available for plaintiffs' claim.[14] If the government's

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[13] Plaintiffs in Thomas have also relied on the waiver of sovereign immunity provided in 12 U.S.C. §1702 and 42 U.S.C. §1404a of the Housing Acts for HUD's actions with respect to the Section 8 program.

[14] HUD's brief in Thomas, filed in the Tenth Circuit on January 14, 1988, states, (continued...)

position prevails in Thomas, plaintiffs will be forced to litigate their claim for declaratory and injunctive relief in the Claims Court, with any appeal being heard in the Federal Circuit. Such a result

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[14](...continued)
at p.25:

> From an objective analysis of what the suit will require the sovereign to do, the relief sought is akin to money damages. It will require that HUD obtain (from somewhere) extensive additional money to pay for 88 more Section 8 units over fifteen years. Needless to say, from the sovereign's perspective, this appears to be relief in the form of money damages for which it has not consented to be sued in this forum.[2]

In footnote 2 on page 25, HUD elaborates:

> Under the Tucker Act, 28 U.S.C. §1491, the United States has consented to suit with respect to certain claims for money damages. . . . The Court of Claims is further empowered under the 1972 amendments to 28 U.S.C. §1491 to award limited equitable relief in order to 'provide an entire remedy and to complete the relief afforded by the judgment ...' Thus, the Court of Claims could afford appellants the relief sought. (Emphasis added.)

would run contrary to the accepted and well-established practice of bringing such entitlement or grant-in-aid lawsuits in the district courts.[15]

Thomas represents one step beyond the position being espoused by HHS in its brief in this case. Here, HHS asserts that a claim for prospective relief should be heard in the Claims Court when it is joined with an action challenging a disallowance, because the disallowance action seeks the payment of money. In Thomas, the United States asserts that a claim for declaratory and injunctive relief must be heard in the Claims Court if the relief sought has financial consequences for the government, even though plaintiffs do not seek money from the United States. This view of "money damages" would mean that virtually any case in which program beneficiaries seek injunctive relief to correct wrongful conduct by the United States would be held

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[15] See n.12, supra.

to belong in the Claims Court.

The Thomas position is wholly inconsistent with Congressional intent. There is no evidence of Congressional intent to shift jurisdiction for cases brought by program beneficiaries involving entitlement or grant-in-aid programs to the Claims Court. Indeed, the history of housing program beneficiary litigation demonstrates that until recently, it was accepted practice that such cases could properly be brought in the district courts by a waiver of sovereign immunity provided by either the APA or housing acts. Yet, the government would have the Court turn the APA on its head by depriving district courts of jurisdiction in cases where there is a prospect of monetary expenditures as a result of complying with the court's declaratory or injunctive relief.

Moreover, a review of the litigation arising under federal housing laws demonstrates that the federal government seeks

to deprive district courts cf jurisdiction over any housing case where there will be financial consequences of complying with judicially imposed declaratory or injunctive relief, regardless of the source of authority relied upon by plaintiffs for waiver of sovereign immunity.[16]

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[16] Despite the government's acknowledgement on page 38, n.32 of their brief that there are statutes in which Congress has provided a separate waiver of sovereign immunity to pursue monetary claims, the government has refused to recognize that the waivers contained in 12 U.S.C. §1702 or 42 U.S.C. §1404 of the Housing Acts as sufficient to afford district court jurisdiction over housing cases with monetary consequences. See, e.g., Johnson v. Secretary of HUD, 710 F.2d 1130 (5th Cir. 1983); Merrill Tenant Council v. HUD, 638 F.2d 1086, 1090 (7th Cir. 1981); Trans-Bay Engineers and Builders, Inc. v. Hills, 551 F.2d 370 (D.C. Cir. 1976). Propelled by decisions such as Amoco Prod. Co. v. Hodel, 815 F.2d 352 (5th Cir. 1987), cert. petition pending; New Mexico v. Regan, 745 F.2d 1318 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); and Portsmouth Redevelopment & Housing Authority v. Pierce, 706 F.2d 471 (4th Cir.), cert. denied, 464 U.S. 960 (1983); and as demonstrated in Thomas, supra, the government apparently intends to pursue its position in every housing case where the possibility of monetary consequences exists. This policy is consistent with the government's contention in this case that the "exclusive jurisdiction of

(continued...)

B. Other Federal Programs

Program beneficiaries of a myriad of federal entitlement and grant-in-aid programs seek enforcement of rights and benefits under such programs by challenging conduct of federal agencies in the federal district courts. In programs ranging from food stamps, education, social security, school lunches, to health and welfare benefits, the federal reporters are filled with judicial decisions construing the rights of beneficiaries under such programs in cases heard by the district courts and regional courts of appeals.

The government's position, as it emerges from this case, Grimesy, and Thomas, would fundamentally alter the practice of having such actions heard in district courts, with appeals to the

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[16](...continued)
the Claims Court extends to any case that includes a Tucker Act claim." (Brief of Petitioners/Cross Respondents at p. 41, n.35.)

regional courts of appeals. Virtually any case that was not purely prospective in nature would risk being shifted to the Claims Court and Federal Circuit. Program beneficiaries would be forced to abandon claims seeking correction of wrongful government conduct if they wished to have actions for prospective relief heard in the district courts. This would flow from the fact that virtually every case brought by program beneficiaries seeking declaratory, injunctive or mandatory relief to correct wrongful agency action necessarily has a direct or indirect financial consequence.

While artful pleading should not be permitted to distort a suit for money damages into an equitable action, the converse is equally true: the government should not be permitted to distort suits for equitable relief into ones for money damages.[17] Typically, program benefi-

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[17] See Brief of the Petitioners/Cross Respondents, at p. 22.

ciaries seeking judicial review of alleged agency misconduct sue for injunctive and declaratory relief, not only in form but in reality. They seek judicial review of a policy, regulation or practice which impinges on the ability of the aggrieved beneficiary to obtain statutory entitlements. The relief they seek cannot be provided by the Claims Court. For example, the Claims Court cannot require a federal agency to use Notice-and-Comment rulemaking. It cannot enjoin an agency from arbitrary and capricious action, or require an agency to follow a certain procedure. The Claims Court cannot prohibit an agency from making future decisions. The only thing the Claims Court can do is to order an agency to pay money and any relief necessary to accomplish that act. It can do nothing about preventing an agency from repeating the offending conduct in the future. This kind of relief is available only in the district court.

If this Court were to accept the government's broad view of "money damages", and its broad view of the jurisdictional implications of a claim for "money damages" against the United States, the district courts would be divested from jurisdiction over cases involving government benefits of any type, whenever beneficiaries sought to correct wrongful agency conduct. Such a result would not further Congressional intent, would not lead to a reasonable allocation of responsibilities in the federal court system, and would impair the abilities of federal program beneficiaries to seek relief for wrongful government conduct.

CONCLUSION

This Court should hold that the Tucker Act does not divest a district court from exercising jurisdiction over a disallowance action. If the Court concludes that a disallowance action arises under the Tucker Act, it should make clear that the decision

does not determine the related but distinct issue of Tucker Act jurisdiction for a state's third party complaint seeking to require federal financial participation in an underlying action between beneficiaries and a state.

Respectfully submitted,

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